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ORIGINAL (2)

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1987

RALPH M. KEMP, Warden,	)	
Petitioner,	)	
v.	)	No. 87-1226
CHARLIE BENSON BOWEN,	)	
Respondent.	)	

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner, CHARLIE BENSON BOWEN, by his undersigned counsel, requests leave pursuant to Supreme Court Rule 46 to proceed in forma pauperis in the above-styled action.

Petitioner's affidavit of indigency is attached hereto and incorporated in this motion by reference.

Dated: February 17, 1988.

Respectfully submitted,

William Allen Alper

COUNSEL FOR MR. BOWEN

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RALPH KEMP, WARDEN,

Petitioner,

v.

CHARLIE BENSON BOWEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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Counterstatement of the Questions Presented

I.

Does a Court of Appeals have authority *sua sponte* to recall its own mandate in a case and to order it reheard *in banc* to reconcile conflicting panel decisions within the circuit on the same issue after the case has been remanded to the District Court for further proceedings?

II.

When a criminal defendant has asserted a defense of insanity without conceding, if the defense is rejected by the jury, the element of intent to commit the crime charged, and the evidence of defendant's state of mind at the time of the alleged crime is ambiguous and conflicting, is it harmless error for the trial court to give the jury an instruction which unconstitutionally shifts to the defendant the burden of proof on intent in violation of the rule of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) and *Francis* v. *Franklin*, 471 U.S. 307 (1985)?

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The in banc opinion of the Court of Appeals is reported as Bowen v. Kemp, 832 F.2d 546 (11th Cir. 1987). The original panel opinion of the Court of Appeals is reported as Bowen v. Kemp, 769 F.2d 672 (11th Cir. 1985) vacated, 810 F.2d 1007 (11th Cir. 1987). The order of the District Court is unreported and is reproduced in Petitioner's Appendix A at App. 1 to App. 48.

Jurisdiction

See Petition at 21. The District Court had jurisdiction of Respondent's petition for a writ of habeas corpus under 28 U.S.C. § 2254(b).

COUNTERSTATEMENT OF THE CASE

A. Procedural History

The history of this case prior to Respondent Bowen's Federal habeas corpus petition is accurately set forth in the Petition for Certiorari. On March 16, 1984 the United States District court for the Northern District of Georgia, Rome Division (Murphy, J.) granted Bowen's application for a writ of habeas corpus finding, inter alia, that the charge given during the guilt/innocence portion of Bowen's trial impermissibly shifted to him the State's burden of proving intent in violation of Sandstrom v. Montana, 442 U.S. 510 (1979) and that the Sandstrom error was not harmless. The District Court concluded that intent remained at issue at Bowen's trial even though the jury rejected his defense of insanity and that there was conflicting evidence as to his state of mind at the time of the crime, so that the Sandstrom error could not be held to have been harmless.

On August 6, 1985 the Court of Appeals reversed the District Court's determination as to the Sandstrom issue, agreeing that the jury charge unconstitutionally shifted to Bowen the State's burden of proving intent, but holding the error harmless. Bowen v. Kemp, 769 F.2d 672 (11th Cir. 1985), cert. denied, ____ U.S. ____, 106 S.Ct. 3337 (1986), vacated, 810 F.2d 1007 (11th Cir. 1987). The panel majority concluded that Bowen had conceded intent by pleading insanity, thus removing the issue from the case, and that the evidence of intent was overwhelming. 769 F.2d at 676-78.

The Court of Appeals remanded the case to the District Court "for the granting of appropriate relief" on issues unrelated to the Sandstrom question, including a new sentencing trial "before a properly empaneled jury" 769 F.2d at 689. At the time the court's mandate was recalled, early in 1987, the District Court was still considering unresolved aspects of Bowen's application for habeas corpus relief and no new sentencing trial had been held or even commenced.

On October 28, 1986, a different panel of the Court of Appeals decided Dix v. Kemp, 804 F.2d 618 (11th Cir.), vacated, 809 F.2d 1486 (1987). Dix also involved a burden-shifting jury instruction on intent which violated Sandstrom. Contrary to the panel decision in Bowen, the Dix panel rejected the proposition that, where the defendant has asserted an insanity defense, intent is no longer an issue in the case and such an instruction is therefore harmless. The Dix panel noted that the Bowen decision was contrary not only to the Dix panel's opinion, but also to an earlier panel decision addressing the same question, Thomas v. Kemp, 766 F.2d 452 (11th Cir. 1985). (Intent was placed in issue by the defendant's insanity defense and, therefore, Sandstrom

error was not harmless). Accordingly, the Dix panel suggested that "the existence of conflicting precedents on this issue may make this case ripe for reconsideration by the en banc court, which can resolve the conflict." Dix v. Kemp, supra, 804 F.2d at 622.

As a result of the Dix panel's suggestion, on January 26, 1987 the Court of Appeals, sua sponte, recalled its earlier mandates and ordered rehearing in banc in this case, 810 F.2d 1007 (11th Cir. 1987) and in Dix v. Kemp, 809 F.2d 1486 (11th Cir. 1987).

B. Material Facts

The issue decided by the Court of Appeals in banc was whether the jury charge given at Bowen's guilt/innocence trial, which unconstitutionally shifted to him the burden of disproving intent (Sandstrom v. Montana, 442 U.S. 510 (1979)), was harmless error. The facts material to that decison are related in the District Court's order and the Court of Appeals in banc opinion (832 F.2d at 551 and n.14). The District Court had found that Bowen had not conceded the issue of intent by raising the defense of insanity and that the evidence as to Bowen's state of mind was "less than overwhelming" (Petitioner's Appendix A at App. 34). The Court of Appeals in banc agreed, noting that there was "ambiguity in Bowen's conduct, and there was conflicting expert testimony on his state of mind", 832 F.2d at 551, and found that "[t]here was a legitimate jury issue as to Bowen's state of mind". Id. n.14.

REASONS FOR DENYING THE PETITION

This case presents no "special and important reasons" for review on writ of certiorari and the petition should be denied. Sup. Ct. R. 17.1. No new principles of law were announced, no precedents were overruled and no conflicts with other circuits or prior decisions of this Court were created. The majority and the dissenters in the Court of Appeals agreed on the principles of law to be applied -- that the trial court's jury instruction had violated the rule of Sandstrom v. Montana and that a harmless error analysis was required; they disagreed only as to the application of that analysis to the specific facts of this case.

The majority held on those facts that Bowen had not conceded intent when he asserted a defense of insanity, that intent remained an issue in the case, and that the State was, therefore, obliged to prove that element of the crime beyond a reasonable doubt, even though the jury rejected the insanity defense. Bowen's failure to prove insanity by a preponderance of the evidence did not obviate the State's constitutional burden to prove intent beyond a reasonable doubt.

The Court of Appeals then carefully analyzed the evidence concerning intent and found, as the District Court had, that Bowen's conduct had been "ambiguous" as to intent and that the evidence of his state of mind was "conflicting". The court concluded that the ambiguous, conflicting evidence of intent was not so overwhelming as to render harmless the Sandstrom error which unconstitutionally shifted to Bowen the burden of proof on intent. The dissenting opinions agreed with the majority as to the law and disagreed only as to whether the evidence of intent at Bowen's trial had been overwhelming.

The Court of Appeals' authority to render its decision is so plain that neither the majority nor the dissenting opinions found it necessary even to address the question. The court's reconsideration of this case in banc, along with Dix, to resolve the conflict among the panel opinions in the circuit on the Sandstrom issue, is not a "special and important reason" for review by this Court on a writ of certiorari.

I. The Court of Appeals Had Ample Authority to Recall Its Own Mandate and to Rehear This Case In Banc

Petitioner cites no authority for his contention that the Court of Appeals had no power to recall its mandate and to rehear this case in order to reconcile conflicting decisions among its panels. Petitioner's failure to cite supporting authority is due to the fact that there is none. The Court of Appeals' authority to recall its mandate and set the case down for rehearing in banc is plain; it is found in statutes, the Federal Rules of Appellate Procedure, the rules of the Eleventh Circuit and decisions of this Court and courts of appeal.

Rule 35(a) of the Federal Rules of Appellate Procedure permits rehearing in banc whenever the requisite number of judges votes to use the procedure. That rule provides that "[a] majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc". The Notes of the Advisory Committee on Appellate Rules state that Rule 35 "does not affect the power of a court of appeals too initiate in banc hearings sua sponte".

"[T]he right of an appellate court to recall a mandate has long been recognized as an inherent power of the court". United States v. Barela, 571 F.2d 1108, 1114 (9th Cir.), cert. denied, 436 U.S. 963 (1978). Indeed, "no court now takes the

position that a federal tribunal lacks authority to recall its own mandate". American Iron and Steel Institute v. E.P.A., 560 F.2d 589, 593 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978).

The authority of a court of appeals to recall a mandate has a foundation in statute as well as the inherent power of the court. 28 U.S.C. § 2106 "expressly authorizes an appellate court to . . . require such further proceedings 'as may be just under the circumstance'". Greater Boston Television Corp. v. F.C.C., 463 F.2d 268, 277 (D.C.C. 1971) cert. denied, 406 U.S. 950 (1972). Additionally, Eleventh Circuit Rule 27, provides that a mandate may be recalled "to prevent injustice".

The passage of six months' time from issuance of the original mandate (July 11, 1986) to the Court of Appeals' order recalling it and directing rehearing in banc (January 28, 1987), did not deprive the court of its inherent and statutory power to recall its own mandate and order rehearing. In Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 249-50 (1944) this Court approved recall of a mandate issued by a court of appeals years before.

The Court of Appeals' recall of its mandate and rehearing of this case in banc, to reconcile conflicting panel decisions, was entirely proper and raises no issues at all, much less "special and important reasons" for review by this Court.

II. The Court of Appeals Properly Conducted A Harmless Error Analysis

Petitioner argues that certiorari should be granted because the in banc opinion of the Court of Appeals eliminated "as a matter of law" the harmless error rule of Rose v. Clark, 478 U.S. ___ 106 S.Ct. 3101 (1986), "in any case where an insanity defense is offered and an intent charge is given, regardless of

the facts of the case." (Petition at 16). Even cursory review of the in banc opinion shows that the Court of Appeals made no such ruling. In fact, its decision is premised on an intensive analysis of the specific evidence presented at Bowen's trial and the stringent insanity standard embodied in Georgia law. Ga. Code Ann. § 16-3-2 (1984); Adams v. State, 254 Ga. 481, 330 S.E.2d 869 (1985). See Bowen v. Kemp (in banc) at 832 F.2d 550.

The Court of Appeals actually held that "when a criminal defendant raises an insanity defense, a Sandstrom error ordinarliy cannot be harmless on the grounds that intent is not at issue". 832 F.2d at 547. The court stated that "even if the defendant fails to prove his insanity defense, intent ordinarily remains an issue at trial", reasoning that "[a]lthough there may be a theoretical bright line between legal insanity and legal sanity, the reality is that the line is often quite blurred".832 F.2d at 549-550. Thus, the fact that a jury determines that a defendant is not insane within the narrow limits of the Georgia definitiion of insanity, "does not mean it found that the defendant was totally free of mental infirmity or that his capacity to formulate a specific intent was the same as that of a normal or average person. The prosecution must still prove beyond a reasonable doubt that the defendant formed the intent necessary to convict him of murder". 832 F.2d at 550.

Having thus determined that intent remained an issue at Bowen's trial despite the failure of his insanity defense, the court proceeded to determine whether the evidence of Bowen's intent was so overwhelming as to render the Sandstrom error harmless. In this respect, the Eleventh Circuit noted that "[t]here was substantial evidence at trial that Bowen, though not

insane, may have lacked the intent required for murder. There was ambiguity in Bowen's conduct and there was conflicting expert testimony on his state of mind at the time of the crime." 832 F.2d at 551. The court therefore concluded that the evidence of intent was sufficiently inconclusive that "[t]here was a legitimate jury issue as to Bowen's state of mind" and, therefore, that the Sandstrom error had not been harmless. 832 F.2d at 551.

CONCLUSION

The Eleventh Circuit has not eliminated in insanity cases the harmless error review mandated by Rose v. Clark, supra. The Court of Appeals' opinion decided narrow issues rooted in the specific facts of this case. It presents no "special or important" reason for review by this Court and the petition for certiorari should be denied.

Respectfully submitted,

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